IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.568 OF 1988

Appasaheb Abasaheb Paithankar
(since deceased by his legal heirs)
(1) Putalabai Appasaheb Paithankar
(2) Shantaram Appasaheb Paithankar
(3) Sampatrao Appasaheb Paithankar
(4) Yashwantrao Appasaheb Paithankar ...Appellants

Vs.

1.Sitaram Rajaram Vitkar
2.Maruti Rajaram Vitkar
(since deceased by his legal heirs)
2a.Smt.Laxmibai Maruti Vitkar
2b.Gyandeo Maruti Vitkar
2c.Nagnath maruti Vitkar
2d.Miss anjana Maruti Vitkar
2e.Miss Ranjana Maruti Vitkar
2f. Miss Sarubai Maruti Vitkar ...Respondents.
(Respondent Nos.2b to 2f minors
through their guardian mother 2a)

WITH
SECOND APPEAL NO.569 OF 1988.

Appasaheb Abasaheb Paithankar
(since decesed by his legal heirs)
(1) Putalabai Appasaheb Paithankar
(2) Shantaram Appasaheb Paithankar
(3) Sampatrao Appasaheb Paithankar
(4) Yashwantrao Appasaheb Paithankar ...Appellants

Vs.

Govind Rajaram Vitkar ...Respondent.

Smt. Smita Gaidhani Advocate with Ranjit R. Bhonsale,Advocate
for the Appellants in both Appeal.
Mr.Uday Warunjikar,Advocate with Balasaheb Bandal, Advocate
for Respondents No.1, 2(A) and 2(C) in Second Appeal No.568
of 1988.

CORAM: A.S.OKA, J.

DATED: AUGUST 23, 2004.

ORAL JUDGMENT :

1. On November 28, 1988 this Court admitted the Second Appeal No.568 of 1988 by observing that whether the District Court has correctly considered the defence plea of adverse possession and limitation is the substantial question of law. The Second Appeal No.569 of 1988 was also admitted on the same day by framing similar substantial question of law.

2. The facts of both the Second Appeals are more or less identical. Therefore, for the sake of convenience, the reference is made to the facts of the case in Second Appeal No.568 of 1988.

3. The Appellant is the original Plaintiff and the Respondents are the Defendants. The dispute is about the property bearing C.T.S.No.332 and 334 which is more particularly described in the plaint. The case of the Appellant is that the suit property was originally belonging to Raje Ratansing Shambhusing Jadhavrao Jahagirdar of erstwhile Malegaon State (Sansthan). The Appellant being the 'Mankari' of the said Santhan was given gift of the suit property by the said Raje Ratansing in the year 1944. It is the case of the Appellant that he was put in possession of the suit property as the owner. The case of the Appellant is

that the Respondents are in illegal possession of the suit property and therefore, the suit for possession came to be filed by the Appellant.

4. The suit was resisted by the Respondent by filing written statement. In the written statement the Respondents initially denied the title of the Appellant and contended that the Appellant was never put in possession of the suit property and the Respondents were in possession of the suit property since the year 1930 and a permanent house was erected in the year 1930 itself. In the alternative the Respondents pleaded that they have perfected their title to the suit property by adverse possession.

5. The learned Trial Judge framed various issues including the issue of title of the Appellant. The 'Sanand' on which reliance was placed by the Appellant was also considered by the Trial Court. The said 'Sanand' recites that the property described therein has been gifted to the Appellant by Raje Ratansing Shambusingh Jadhavrao. On plain reading of the Marathi transcription of the 'Sanad' which is in 'Modi' script shows that it is a document by which a gift was made by the said Raje Ratansingh in favour of the Appellant with a condition that the Appellant will not be entitled to sell or mortgage or transfer the said land to any third party. The Trial Court accepted the submission that the said document is compulsory registrable document and for want of registration,

it cannot be read in evidence. However, the Trial Court held that it can be read in evidence for collateral purposes as the same is a 30 years old document. The Trial Court, therefore, held that the Appellant had a better title over the Respondents. Therefore, the decree for possession came to be passed by the Trial Court which has been set aside by the District court in an Appeal preferred by the Respondents. The Appellate Court framed points for determination both on the issue of ownership of the Appellant as well as on the plea of adverse possession of the Respondents. The Appellate Court answered the issue of title of the Appellant against the Appellant and held that the Respondents have proved their case of adverse possession.

6. The learned Counsel for the Appellants submitted that in view of Indian Registration Act, 1877, a document did not require compulsory registration. She also relied upon the provision of the Government Grants Act, 1895 (hereinafter referred to as the said Act of 1895). She submitted that the grant will have to be construed as a Government grant and therefore the provisions of Transfer of Property Act,1882 (hereinafter referred to as the said Act of 1882) are not applicable to the transfer made in favour of the Appellant. She submitted that even assuming that the document is treated as a gift, the provisions of Section 123 of the said Act of 1882 will not apply in view of applicability of the said Act of 1895. She submitted that the Respondents have not

established the adverse possession. She submitted that even if the document is a compulsory registrable document, it can be read in evidence for collateral purposes as done by the Trial Court. She, therefore, submitted that the decree passed by the Appellate Court is unsustainable.

7. Shri Warunjikar supported the Judgment of the Appellate Court. He pointed out various findings recorded by the Appellate Court.

8. I have considered the rival submissions. The perusal of the plaint clearly shows that the suit was filed by the Appellant on the basis of title as owner and for that purpose reliance was placed on the grant made in favour of the Appellant by Raje Ratansing. The perusal of the averments made in the plaint filed by the Appellant shows that the suit is on title and possession is claimed only on the basis of title and not on the basis of prior possession. Therefore, the Appellant cannot succeed unless his title is established. The document of title which is the 'Sanad' on plain reading shows that the said document evidences the gift of certain immoveable property in favour of the Appellant by Raje Ratansing. The document is executed in the year 1944 when the said Act of 1882 was applicable. Section 123 of the said Act provides that for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor,

and attested by at least two witness. The document purports to have been signed by one K.K.Chavare and Jaysingrao Ramrao Jadhav. It is not clear from the said 'Sanad' whether the said two persons have signed as attested witnesses.

9. Section 2 of the said of 1895 reads thus :

> 2. **Transfer of Property Act,1882, not to apply to Government grants -** Nothing in the Transfer of Property Act,1882 contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made [by or on behalf of the [Government]] to, or in favour of, any person whomsoever, but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

It is to be noted here that the part of the said section starting from "by" and ending with the word "Government" was substituted in the year 1937 for the words "Her Majesty the Queen Empress, Her heirs or successors, or by or on behalf of Secretary of State for India in Council". The said Act of 1895 does not define the word 'Government'. Therefore, reference will have to be made to the provisions of the General Clauses Act, 1897 which defines the Government as including both the Central Government and State Government. By no stretch of imagination it can be said that a person claiming to be the King of an Indian State or Sansthan can fall in the category of the "Government" within the meaning of the said Act of 1895. Reliance placed by the learned

Counsel appearing for the Appellants on Section 8 of the General Clauses Act, 1897 will not be available to the Appellants for contending that the provisions of Registration Act,1877 will govern the document. The requirement of registration is under Section 123 of the said Act of 1882 apart from Section 17 of the Registration Act,1908. Clause (a) of Sub Section 1 of Section 17 will clearly apply to the instrument of gift of immoveable property.

10. Therefore, the document of title relied upon by the Appellant was a compulsory registrable document. Even if the the document is to be read in evidence for collateral purposes, it is crystal clear that the document cannot be read as evidence of the title or ownership. At highest it can be read as an evidence of the fact that in the year 1944, the Appellant was put in possession of the property subject matter of the said document.

11. The Appellate Court, therefore, came to the conclusion that the Appellant has failed to establish ownership in respect of the suit property. The plea of adverse possession was taken in the alternative in the event the Appellant established his title. Therefore, the finding on the plea of adverse possession is not at all sustainable against the Appellant as he has failed to prove his ownership.

12. As the suit filed by the Appellant was on title based on

gift and the so called document of title cannot be read in evidence, no fault can be found with the Appellate Court if the finding was recorded that the Appellant has failed to prove his ownership. Therefore, the suit on title was rightly dismissed.

13. In view of this position, both Second Appeals deserve to be dismissed and same are dismissed with no order as to cost.

Judge.